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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 539

INDUSTRIAL WAXES, INC., a corporation,

Petitioner,

against

GERALD FEW BROWN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Industrial Waxes, Inc., has petitioned for a Writ of Certiorari fo review the determination of the Court of Appeals for the Second Circuit which unanimously reversed the decision of the District Court thus absolving the respondent from liability and finding the petitioner to be a self-insurer at the time its merchandise was destroyed by fire. Respondent herein, Gerald Few Brown, respectfully opposes the granting of such writ.

Questions Presented.

Whether this Court, contrary to the expressed intent of Rule 19, should grant review to the unanimous decision of the Court of Appeals in a dispute between parties to a private contract, when such decision concerns a question of contract construction of interest only to the parties to this litigation, is fully compatible with the accepted and customary course of judicial proceedings and is, insofar as the questions concerned have been litigated, fully consistent with applicable decisions of this Court and of other Courts of Appeals.

Statutes Involved.

This case does not turn upon the construction of the Constitution or any statute, rule or regulation of the United States or of any state or local subdivision thereof.

Statement.

The facts elicited from testimony and evidence in this litigation have been fully set forth by the Court of Appeals in its opinion (P. 1a-10a)[1] and in the decision rendered by the trial court (D. A. 113a-127a). In conjunction with these recitals, petitioner has submitted a statement which requires certain clarification due to its failure to include certain salient points and due to its tendency to be misleading by a commingling of fact and editorial comment.

In brief, petitioner purchased insurance from respondent by means of an annual open cover policy, which allowed petitioner, as a shipper, to describe, and declare the value of, each shipment on certificates torn from a pad supplied by the respondent. These certificates became, for all intents and purposes, the policy of insurance as to third parties and, as noted in the decision below, are considered to constitute the contracts in the present dispute. Petitioner was free to declare coverage on the certificates with appropriate language consistent with the terms of the open cover. This the petitioner did, thus writing its own policy of insurance which was binding upon Underwriters.

In May and July, 1951, petitioner shipped two consignments of paraffin wax from Tulsa, Oklahoma, to Santiago, Chile. In October, 1951, while still in a Custom's enclosure at Valparaiso, Chile, the consignments were destroyed by fire.

[1] References to material contained in the Appendix annexed to the petition are indicated by P. followed by the page number. References to material contained in the Appendix submitted by defendant-appellant below are indicated by D. A. followed by the page number.

At the time of shipment, petitioner caused to be typed on the certificates accompanying the two shipments in question the following terms:

> "INSURE CUSTOMER AGAINST ALL RISKS TO CUSTOMER'S WAREHOUSE ALSO PARTICULAR AVERAGE AND LOSS IN CUSTOMS"
>
> "INCLUDES RISK FOR ADDITIONAL THIRTY DAYS AFTER DISCHARGE FROM VESSEL."

The Court found that petitioner, from its choice of language, was aware of the important aspects of the policy of open cover insurance which it had purchased and the trade in which it was engaged. These were:

(1) That there was likely to be a substantial delay between entry of goods in Customs at Valparaiso, Chile, and final delivery at an inland destination in Chile.

(2) That in order to secure protection of the goods for a thirty day period following discharge from ocean vessel at Valparaiso in accordance with the storage declaration clause, it was necessary to make an appropriate declaration on the face of the certificate.[2]

(3) That it not only "seems to have been the custom" (Petition, P. 7) but was a well-known fact that following the first thirty day period the Banco de Chile would cause fire insurance to be placed with Chilean Underwriters upon import goods held in Chilean Customs warehouses.

(4) That, in the face of the absolute requirements stated on both the certificate forms and the open cover policy that the assured must give prompt notice of a "held covered" situation and the knowledge of petitioner that the goods were in such a situation, no effort was made by petitioner to comply with the contractual condition, thus causing the insurance to lapse.

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[2] "Including, if so declared hereon, risk whilst in store after arrival at port of discharge or in warehouse after arrival at final destination for 30 days thereafter held covered at an additional premium.

The fourth point rests upon the following policy language:

> "NOTE — It is necessary for the assured to give prompt notice to Underwriters when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent on compliance with this obligation" and
>
> "Each thirty (30) days, or part thereof, in excess of the first thirty (30) days 0.125%.

Respondent submits that with this state of facts there are no considerations raised which could affect the public interest or the existing state of law. The entire record establishes that the decision of the Court of Appeals was eminently correct, fully justified and logically and legally the only result attainable herein.

Petitioner's President testified that he was in Chile in either August or September, 1951. During that visit he inquired about, and was given, the factual situation concerning the two shipments of waxes involved in this litigation (D. A. 107a). No attempt was made to impart such information to respondent nor was any premium offered for such coverage.

As to the first, testimony of petitioner's president, Edwin C. Price, and Chilean representative, Michael S. McGoldrick, indicates the knowledge by both that the time for clearing goods through Chilean Customs could be lengthy (Price, D. A. 106a; McGoldrick, D. A. 70a, 74a).

As to the second, petitioner's president indicated that he was fully familiar with all terms and conditions of the open cover insurance purchased on an annual basis from Underwriters at Lloyds and that he made a practice of endorsing the certificates in the manner quoted above (D. A. 16a, 91a-92a). Testimony of both the president and Chilean representative of the petitioner confirm the third point that petitioner was fully aware of the customary practice of

Banco de Chile in placing fire insurance on goods held in Customs for any period in excess of thirty days (Price, D. A. 111a; McGoldrick, D. A. 75a).

Argument.

Petitioner has set forth several proposals by means of which it seeks to place this litigation within the scope of causes subject to review by this Court. Because the points are somewhat unclear the respondent has taken the liberty of paraphrasing the various arguments set forth.

I. Whether the purchase of warehouse to warehouse transit insurance containing warehouse extension clauses creates a limitless responsibility upon underwriters to continue the insurance in effect until goods are finally destroyed.

Clearly the answer to this argument is that the language of the contract must control; that, as found by the Court of Appeals, insurance coverage under the policy in dispute expired thirty days after the goods were discharged from the vessel due to failure of the petitioner to extend the period of coverage. Emphasis by the petitioner of the fact that it exercised no control over the goods does not alter the limitations in the insurance contract; the controlling factor is the requirement that Underwriters be promptly informed of any discontinuance of transit and that appropriate premiums be paid by an Assured in order to keep the insurance cover in full force and effect.

Petitioner has quoted portions of the policy which are admitted to be superseded and has failed to recite the replacing text as well as the warehouse extension clause, both of which are fully integral portions of the policy contract. Petitioner also argues that placing of goods in Customs is not to be considered warehousing, but during the five month period the goods were still considered to be in transit.

Such assertion is sought to be supported by citation of decisions, all of which were before the Court of Appeals and were found inapposite. This argument fails by the very fact that the policy includes certain wording:

> "Including, if so declared hereon, risk whilst in store after arrival at port of discharge . . . for thirty days thereafter held covered at an additional premium."

The issue sought to be raised by questioning the semantics of "warehousing" is nothing, if not a red herring. Whether the goods were in customs or on a dock congested with imported cargoes is of no concern to underwriters if the assured fulfills the conditions of informing underwriters and purchasing appropriate insurance for the period of time the goods are prevented from going forward to inland destination.

The argument that Underwriters were or should be aware of delays to be anticipated in clearing Chilean customs loses complete force when it is apparent from the policy contract that Underwriters have taken this contingency into account in the language of the policy insuring the goods.

II. Whether the typewritten declaration placed on the certificate of insurance by the assured, confirming that coverage is desired for a period which is allowed under the policy (if such declaration is made), serves to enlarge underwriters' contractual obligations beyond the termination of the period covered by such declaration.

The quite apparent answer to the foregoing is that the Assured, in accepting a right conferred by the contract of insurance, accepted termination of such coverage unless the Underwriters have received notification that insurance cover is requested for an additional period of

time. Along with the notification is the requirement that the Assured pay additional premiums in order to secure the additional cover. The assertion by the petitioner that the burden was upon respondent to claim additional premium on these shipments and on earlier similar shipments is belied by the fact that respondent had no knowledge nor any means of knowledge, other than through the petitioner, of the position of shipments. It required presentation of a claim to acquaint the insurer of the true facts. Good fortune of petitioner in having no previous losses prevented the respondent from deriving information in the same manner on previous shipments.

III. Whether it was an error for the unanimous Court of Appeals to reverse a decision by the District Court and to set aside the judgment entered by the District Court.

Prior to trial of the issues counsel for petitioner and respondent propounded and reached agreement upon a stipulation of the principle facts governing this dispute and of the positions taken by each party. This stipulation was before the Court as a pre trial order marked "Exhibit 1".

Prior to trial, deposition testimony was taken of Edwin C. Price, President of the petitioner herein, and Michael S. McGoldrick, Chilean agent for the petitioner. Those depositions were submitted to the District Court as "Exhibit 2" and "Exhibit 3".

On trial some additional testimony was taken by the parties of Edwin C. Price and from A. Henry Smith, an expert, placed on the stand by the respondent herein whose testimony was discounted in full by the trial court.

The stipulation of facts, deposition testimony and brief examination of the two witnesses at trial were contained in the Appendix submitted by the defendant-appellant on appeal to the Court of Appeals. That Court had before

it the same record that the trial court was able to consider. The Appellate Court was unable to confirm the findings of the District Court and was compelled to set aside the judgment rendered in the District Court. Upon concluding that the District Court had misconstrued and misapplied the applicable law. Such action is particularly and clearly the function for which appellate procedure is provided. Failure of the Court of Appeals to reverse the erroneous decision of the lower court would have constituted an abdication of its function.

CONCLUSION.

For the reasons set forth herein, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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